Sovereign Immunity

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In discussing the current statute abrogating the doctrine of sovereign immunity, the authors trace the history of the immunity of the state from suit, focusing on the governmental/proprietary distinction and the question of duty as it relates to municipalities and counties. After examining how the courts have narrowly construed the current statute, the article identifies specific areas in which additional legislation is needed if there is to be an effective and complete waiver of immunity.

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I. INTRODUCTION

The 1973 Florida Legislature enacted a statute\(^1\) abrogating the doctrine of sovereign immunity in tort. This represented the second attempt by the legislature within four years to waive the immunity of the state.\(^2\)

The action of the legislature can be viewed as an attempt to reconcile an inherent conflict in the state's constitution. Article X, section 13 of the Florida Constitution, by negative implication, adopts the doctrine of sovereign immunity.\(^3\) This section limits the

\(^{1}\) 1973 Fla. Laws ch. 73-313, § 1 (codified at Fla. Stat. § 768.28 (1977)).

\(^{2}\) 1969 Fla. Laws ch. 69-116, §§ 1-5 (waiving immunity) (effective July 1, 1969). The
Act was not signed by the Governor and was filed in the Office of the Secretary of State on June 20, 1969. 1969 Fla. Laws ch. 69-357, § 1 (repealing id. ch. 69-116, §§ 1-5 (effective July 1, 1970)). This Act was also not signed by the Governor and was filed in the Office of the Secretary of State on July 5, 1969. Within fifteen days thereafter, the legislature reconsidered and rescinded the statute, thus permitting the waiver to operate for only one year.

\(^{3}\) Fla. Const. art. X, § 13, Suits against the State, provides: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter
full application of the “Access to Courts” provision in the constitution. By enacting section 768.28 of the Florida Statutes (1977), the legislature has eliminated a major impediment for persons injured by the sovereign.

No other single form of immunity affects as many persons as does the grant of governmental immunity. When Florida originally adopted the doctrine, the state acted almost exclusively in a governmental role. Thus, there was much more justification for the grant of governmental immunity. Today, however, government has entered areas historically left to the private sector, and the use of sovereign immunity is much less justifiable. In many instances it is unjust and counterproductive. Until the legislature exercised its constitutional prerogative to waive immunity, the right of access to the courts for any injury, as provided by the constitution, was a hollow one for many citizens who came into contact with the state.

In 1969, the first Florida statute waiving immunity was enacted. This statute was in effect for only one year. In 1973, the current statute was enacted and became effective on January 1, 1975. The effective date was amended in 1974 so that the Act became effective July 1, 1974 for the executive departments of the state.

Though it appears that Florida made no attempt to abrogate its immunity until 1969, an apparent exception to the doctrine has existed in the statutes since 1953. Section 455.06 of the Florida Statutes (1977), entitled “Liability insurance; authority of counties, state agencies and certain political subdivisions to purchase,” has been relied upon by plaintiffs for twenty years in actions against the state. The statute effects a limited waiver of immunity for govern-
mental bodies purchasing liability insurance in certain situations. As will be developed in section IV, the courts have been faced with the issue of whether the factual situation of each case fits within the abrogation of immunity as delineated by the statute.

In order to appreciate the impact of section 768.28, it is necessary to examine the history of the state’s immunity. Section II discusses immunity from suit granted to the state, its counties and its municipalities. Section III deals with the governmental/proprietary distinction and with the question of duty as it relates to municipalities and counties. Section IV analyzes the effect of section 455.06 on the question of immunity. Section V provides a section by section discussion of the current statute. Finally, Section VI contains the authors’ conclusions.

II. THE GRANT OF IMMUNITY

A. The State and Its Counties

The doctrine of sovereign immunity rests upon two distinct theories. The first was borrowed from the English common law theory that the King, ascending to the throne by divine right, can do no wrong, and the states adopted this rationale of being above the law. A second justification for the doctrine was offered by Justice Holmes in Kawananakoa v. Polyblank: “A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”

The closest statement of the rationale for the doctrine by a Florida court appeared in State Road Department v. Tharp: “If the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked.”

Though the rationale has a narrow basis, its application has been pervasive. In Spangler v. Florida State Turnpike Authority,
the Supreme Court of Florida was called upon to determine if the State Turnpike Authority was a state agency and, accordingly, immune to liability for damages in tort. Noting that the statute creating the Authority\textsuperscript{21} declared it to be "a body corporate and politic"\textsuperscript{22} performing "an essential governmental function,"\textsuperscript{23} the court had "no difficulty in arriving at the conclusion that the . . . Turnpike Authority is an agency of the state government."\textsuperscript{24} Therefore, "[a]s a state agency, . . . it shares in the sovereign immunity to suit."\textsuperscript{25}

Two areas where the doctrine has been applied are the fields of education and health care. With respect to education, a distinction has been drawn between the state university system and the school districts of the state.

In 1937, the Attorney General was asked what liability could be imposed upon the University of Florida in operating an elevator.\textsuperscript{26} The Attorney General opined:

The only liability on the part of the University of Florida is that which is created under the provisions of the Florida Workman's Compensation Act. . . . There would be no enforceable liability insofar as the general public is concerned for the reason that the State of Florida and its agencies are not liable for torts which they may commit.\textsuperscript{27}

In the ensuing years the absolute grant of immunity remained, as evidenced by another opinion of the Attorney General\textsuperscript{28} which dealt with the question of whether the University of Florida should procure liability insurance in connection with the renting of rooms. The Attorney General stated that no insurance was necessary as "[t]he State and its agencies are not liable for injury to the persons or property of persons occupying its premises."\textsuperscript{29}

The opinions of the Attorney General and the judicial decisions\textsuperscript{30} regarding the immunity of the University from liability in a purely proprietary function were regrettable. They could be viewed as allowing negligent conduct without redress. A grant of immunity negates much of the incentive for the state university to repair or

\begin{itemize}
  \item \textsuperscript{21} FLA. STAT. § 340.05 (1969) (repealed by 1971 Fla. Laws ch. 71-377, § 120).
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} 106 So. 2d at 422.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} [1937-38] FLA. ATT'Y GEN. BIENNIAL REP. 243.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} [1949-50] FLA. ATT'Y GEN. BIENNIAL REP. 474.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} See, e.g., Erwine v. Gamble, Pownal & Gilroy, 343 So. 2d 859 (Fla. 2d DCA 1976).
\end{itemize}
inspect buildings, machinery or other equipment.

The failure to inspect and repair, however, is not restricted to the state university system, as indicated by the following two decisions dealing with the liability of a school district. School districts as agencies of the state “are clothed with the same degree of immunity from suit as is the State.” In Bragg v. Board of Public Instruction, a high school student was injured while working an old printing press. The Supreme Court of Florida held that the Board was immune from tort liability because it was engaged in a “purely governmental function,” and that the use of the printing press was part of the curriculum of the school.

In Buck v. McLean, a Board of Public Instruction appeared to be acting in a proprietary function when Mrs. Buck sustained injuries as a paying spectator at a high school baseball game. The District Court of Appeal, First District, affirmed defendant’s summary judgment, drawing a distinction between a paying spectator at a baseball game and a paying patient at a county hospital and pointing out that the hospital was more like a private corporation devoid of governmental function. While the paying patient could recover for damages sustained, the paying spectator could not.

Implicit in the doctrine of immunity is that a state employee, responsible for alleged tortious conduct, is protected from suit when acting within the course and scope of employment. The decisions of the District Courts of Appeal, First and Fourth Districts in Loucks v. Adair and Martin v. Broward General Medical Center reflect the extent to which an employee is protected by the doctrine.

In Loucks, the plaintiff, a mental patient, sustained injury while escaping from a hospital. He named as defendants the Department of Health and Rehabilitative Services of the State of Florida,

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33. 160 Fla. 590, 36 So. 2d 222 (1948).
34. Id. The court stated that it was unnecessary to decide whether the use of the printing press itself was a governmental or proprietary function. Id. at 591, 36 So. 2d at 223.
35. 115 So. 2d 764 (Fla. 1st DCA 1959).
36. The complaint alleged negligence on the part of the school board in permitting a wire screen separating the spectator and players to deteriorate, thereby permitting a ball to pierce the screen and to strike the plaintiff.
37. See Suwannee County Hosp. Corp. v. Golden, 56 So. 2d 911 (Fla. 1962). For a discussion of the Suwannee decision, see notes 45-51 and accompanying text infra.
39. 312 So. 2d 531 (Fla. 1st DCA 1975).
40. 332 So. 2d 84 (Fla. 4th DCA 1976).
the superintendent of the hospital and a state employed physician. The First District affirmed the trial court's dismissal of the complaint on authority of *Buck v. McLean.*\(^1\) Louck's contention that *Suwannee County Hospital Corp. v. Golden*\(^2\) controlled was rejected. Though Loucks was a paying patient, as was the plaintiff in *Suwannee County,* the court emphasized that the long standing obligation of the state to maintain mental hospitals was a governmental function and hence distinguished *Suwannee County,* where a county-operated hospital was held to be a proprietary endeavor.

In *Martin,* plaintiff voluntarily committed herself to a state mental hospital where defendant-physician erroneously diagnosed her ailment. The trial court dismissed the suit on the authority of *Loucks.* The Fourth District affirmed, holding that the fact that the physician had malpractice insurance was irrelevant to the issue of his liability.\(^3\) The physician had protected himself from potential liability by voluntarily procuring insurance. As no claim was made against the state, the court could have found that the procurement was a waiver of immunity to the extent of insurance coverage.\(^4\)

During the period prior to the enactment of a general law waiving immunity, there were two decisions holding that a county could be liable for damages in tort.\(^5\) As it had long been held that a county is a political subdivision of the state and hence immune from suit,\(^6\) these two decisions are the exceptions to the doctrine of state immunity.

*Suwannee County Hospital Corp. v. Golden*\(^7\) was an action by a paying patient against a county hospital. In rendering judgment against the hospital, the trial court implicitly ruled unconstitutional a provision of the legislative enactment creating the hospital.\(^8\) The supreme court affirmed, distinguishing between a hospital created

\(^{1}\) 312 So. 2d 531, 532 (Fla. 1st DCA 1975).

\(^{2}\) 56 So. 2d 911 (Fla. 1952). For a discussion of the *Suwannee* decision, see notes 45-51 and accompanying text infra.

\(^{3}\) 332 So. 2d at 85.

\(^{4}\) See, e.g., *Surette v. Galiardo,* 323 So. 2d 53 (Fla. 4th DCA 1975); *Buffkin v. Board of County Commrs,* 320 So. 2d 876 (Fla. 4th DCA 1975); *FLA. STAT.* § 455.08 (1977). But see *Valdez v. State Road Dep't,* 189 So. 2d 823 (Fla. 2d DCA 1966).

\(^{5}\) *Suwannee County Hosp. Corp. v. Golden,* 56 So. 2d 911 (Fla. 1952); *Butts v. Dade County,* 178 So. 2d 592 (Fla. 3d DCA 1965).

\(^{6}\) See, e.g., *Arnold v. Shumpert,* 217 So. 2d 116 (Fla. 1968); *Kaulakas v. Boyd,* 138 So. 2d 505 (Fla. 1962); *Waite v. Dade County,* 74 So. 2d 681 (Fla. 1954); *Kellin v. Hillsborough County,* 71 Fla. 396, 71 So. 372 (Fla. 1916); *McPhee v. Dade County,* 362 So. 2d 74 (Fla. 3d DCA 1978).

\(^{7}\) 56 So. 2d 911 (Fla. 1952).

\(^{8}\) 1945 Fla. Laws ch. 23547, which provided in part: "The said corporation . . . shall not be liable for any negligence of any officer, agent or employee of said corporation."
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by a special act of the legislature and a school district. Furthermore, as the institution was not part of a state-wide system maintained at public expense and open to all, the benefit of immunity would not vest.

It is evident that the supreme court deemed the fact that Mrs. Golden was a paying patient to be controlling: "At least as to those who are paying patients . . . the hospital is operated in a proprietary capacity and they may not be divested of constitutional rights by the attempted statutory immunization." In dictum that would furnish the basis for future attempts to hold the state responsible for its torts, the court stated that "[a]n enterprise is not governmental in character simply because the government enters into it or the Legislature declares it so." The well-reasoned decision appeared to be a watershed in the law. It has been continuously distinguished, however, with but one exception.

In Butts v. County of Dade, the District Court of Appeal, Third District, held that a bus passenger had a valid action against a county operated bus system. The court found that the gravamen of the action was in contract. Relying on Suwannee, the court ruled that operating a bus system was a proprietary function to which liability could attach. As with the Suwannee decision, Butts has been relied upon by plaintiffs as precedent for bringing suit. And, as with the Suwannee decision, Butts has been distinguished to the degree that both decisions can be limited to their facts.

Article X, section 13 of the 1968 Constitution of the State of Florida provides that the doctrine can be abrogated by "general law." Construing the term "general law" to mean that it must apply to all, the Supreme Court of Florida in Arnold v. Shumpert held unconstitutional a special act of the legislature permitting a county to procure liability insurance and to waive immunity to the extent of such insurance coverage.

50. 56 So. 2d at 913.
51. Id.
52. See, e.g., Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113 (Fla. 1976); Loucks v. Adair, 312 So. 2d 531 (Fla. 1st DCA 1975); Smith v. Duval County Welfare Bd., 118 So. 2d 98 (Fla. 2d DCA 1960); Buck v. McLean, 115 So. 2d 764 (Fla. 1st DCA 1960).
53. 178 So. 2d 592 (Fla. 3d DCA 1965).
54. See, e.g., Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113 (Fla. 1976); McFtee v. Dade County, 362 So. 2d 74 (Fla. 3d DCA 1978).
55. See note 3 supra.
56. 217 So. 2d 116 (Fla. 1968).
57. 1953 Fla. Laws ch. 29348.
Plaintiffs have also been unsuccessful in claims that immunity is an affirmative defense that is waived if not properly raised,\(^8\) waived by the state’s intervention in a suit,\(^9\) waived when the state engages in a proprietary function,\(^6\) or waived based upon a home rule charter.\(^4\)

The courts have rejected these contentions by holding that “[a] state’s immunity from suit relates to subject matter jurisdiction” which “may be raised at any time,”\(^2\) by falling back on its construction of article X, section 13 of the constitution,\(^3\) or by refusing to distinguish between governmental and proprietary functions.\(^6\)

Though the state and counties have been protected by the full grant of immunity, municipalities have not been similarly protected and have been held liable for performing a proprietary function which, if performed by a county, would have been protected.\(^6\)

B. Municipalities

Though similar in many respects, the distinguishing characteristics between municipalities and counties help to explain the difference between the immunity enjoyed by a county and that enjoyed by a municipality. Municipalities, though authorized by the constitution,\(^6\) are basically corporations organized for the advantage and convenience of the citizens of a particular location.\(^6\) Citizens of municipalities have a proprietary interest in the property of the municipality, while the citizens of a county have no such interest in the property of the county.\(^6\) Counties are governmental agencies through which many of the functions and powers of the state are exercised.\(^6\) As political subdivisions of the state,\(^6\) they are accorded

58. Schmauss v. Snoll, 245 So. 2d 112 (Fla. 3d DCA 1971).
59. Davis v. Watson, 318 So. 2d 169 (Fla. 4th DCA 1975).
60. Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113 (Fla. 1976).
63. Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1962); Davis v. Watson, 318 So. 2d 169 (Fla. 4th DCA 1975).
64. Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113 (Fla. 1976).
65. Compare Ide v. City of St. Cloud, 150 Fla. 806, 8 So. 2d 924 (1942) (municipality liable for drowning at public beach) with McPhee v. Dade County, 362 So. 2d 74 (Fla. 3d DCA 1978) (county not liable for drowning at public beach).
66. FIA. CONST. art. VIII, § 2.
68. Id. at 358, 71 So. at 373.
69. Id.
70. FIA. CONST. art. VIII, § 1(a); Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372 (1916).
full immunity from tort liability for their endeavors. Municipalities, on the other hand, have only been protected when acting in their governmental capacities, not when performing proprietary functions.

This distinction between counties and municipalities may have been valid in an era when the counties and the state stayed within their respective governmental spheres, leaving to the municipalities, or the private sector, the duty to perform essential proprietary services. The recent proliferation of proprietary services performed by the counties and state, however, has largely abrogated the reason for extending immunity to all acts of the counties and state. The governmental expansion into the field of proprietary services must carry with it a reciprocal obligation to exercise a duty of reasonable care in carrying out those activities. Over twenty-five years ago Justice Thomas wondered when the expansion of government into the private sector would cease.

If the government undertakes to enter other fields such as amusement, entertainment, transportation, and communication, as is the present trend, . . . should the situation be made more unfair by declaring that inasmuch as the government is involved, no redress should be secured to one injured by negligence in the operation?

Prior to 1957, the governmental/proprietary distinction controlled the liability of a municipality with sometimes inconsistent results. This rule was abolished by the Supreme Court of Florida in the landmark decision of Hargrove v. Town of Cocoa Beach.

Mrs. Hargrove brought suit against the municipality, alleging that the negligence of the town jailer was the proximate cause of her husband's death. The trial judge sustained the motion of the town to dismiss on the theory that the jailer was acting in a governmental capacity. The court reversed holding that "when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done." Though the court tempered its holding by noting that no

72. Compare Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938) (city not liable for police officer's assault on a prisoner) with Ballard v. City of Tampa, 124 Fla. 457, 168 So. 654 (1936) (city liable when prisoner under control of police officer injured while working on a public street).
73. 96 So. 2d 130 (Fla. 1957).
74. Id. at 133-34 (footnote omitted). It is interesting to note that Justice Thomas dissented without opinion. See note 71 and accompanying text supra.
liability would attach for employees exercising "legislative or judicial, or quasi-legislative or quasi-judicial, functions," \(^7\) the case has proven to have widespread impact. By adopting the doctrine of respondeat superior to enforce tort liability upon municipalities, the court provided broader protection for its citizens. At the same time, however, the court's holding widened the dichotomy between municipalities and counties and the state.

This dichotomy is best illustrated by the status of metropolitan Dade County. By amendment to the Florida Constitution, \(^7\) Dade County was granted authority to adopt a home rule charter. The issue soon arose as to the status of this "constitutional maverick." \(^7\) A section of the home rule charter waiving immunity was struck in *Kaulakis v. Boyd* \(^7\) as being violative of the constitutional provision authorizing waiver of immunity only by general law. \(^7\) The supreme court realized that Dade County, possessing characteristics of both municipal and county governments, merged into a new form of government. \(^8\) However, inasmuch as Dade County was a political subdivision of the state, \(^8\) which can "exercise certain municipal powers in addition to county powers," \(^8\) it continued to partake of the state's immunity. Thus, although the citizens were permitted to adopt a home rule charter, they were barred from bringing suit against the county when it exercised municipal or proprietary functions.

Though the legislature purportedly abolished sovereign immunity by section 768.28 of the Florida Statutes (1977), two concepts which developed before the waiver of immunity continue to influence the courts.

### III. The Governmental/Proprietary Distinction and the Question of Duty

Prior to the supreme court decision of *Hargrove v. Town of Cocoa Beach*, \(^8\) a municipality was liable for its torts only when performing a proprietary function. \(^8\) By discarding this distinction

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75. *Id.* at 133.
76. FLA. CONST. art. VIII, § 11. The section was adopted in 1956 and home rule became effective in 1957.
77. Schmauss v. Snoll, 245 So. 2d 112, 113 (Fla. 3d DCA 1971).
78. 138 So. 2d 505 (Fla. 1962).
79. FLA. CONST. art. X, § 13; see note 3 supra.
80. See County of Dade v. Saffan, 173 So. 2d 138 (Fla. 1965).
82. 245 So. 2d at 113-14.
83. 96 So. 2d 130 (Fla. 1957).
84. A proprietary function promotes the comfort, convenience, safety and happiness of the citizens. A governmental function applies to the administration of some phase of government. See McPhee v. Dade County, 362 So. 2d 74 (Fla. 3d DCA 1978).
and adopting the doctrine of respondeat superior, the court attempted to simplify the determination of the liability of a municipality. Ten years after Hargrove, the court reconsidered the question of the tort liability of a municipality in Modlin v. City of Miami Beach. Modlin sued a building contractor, a storeowner, and a city for the wrongful death of his wife when a storage mezzanine collapsed. Modlin alleged that the city had negligently performed its duty of inspection while construction was in progress. The District Court of Appeal, Third District, affirming summary judgment for the City, found that the duty of the municipality to inspect was a legislative or judicial function. The supreme court affirmed the district court’s conclusion, but not its reasoning. Finding that the inspection of the construction site was an executive function and hence subject to the respondeat superior doctrine, the court viewed the question of duty as controlling. The court reasoned that in order for the city to be vicariously liable for the inspector’s negligence, a breach of duty on the part of the inspector himself would have to be proven. Relying on a seventy-seven year old treatise and a pre-Hargrove decision, the court concluded that the inspector owed Mrs. Modlin a duty of care no greater than that owed to the general public. Therefore, as he could not be held negligent, the city could not be held vicariously liable. The court thus created a fiction by distinguishing between general and specific duty. By requiring “privity” between the employee and claimant, the court established a criterion applicable only to municipalities and severely limited the ability of claimants to seek redress from a municipality.

In Gordon v. City of West Palm Beach, the District Court of Appeal, Fourth District, summarized municipal liability and determined that the Modlin holding applies only when the activity complained of is governmental in character. For purely proprietary functions, a municipality has the same liability as a private corporation, and the Hargrove rule applies.

This rule of law regarding the duty owed to the plaintiff, as compared to the duty owed to the general public, was applicable only to municipalities inasmuch as the counties and the state were totally immune from tort liability. With the statutory abolition of immunity, however, the Modlin holding has taken on new import-

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85. 201 So. 2d 70 (Fla. 1967).
87. F. MECHEN, PUBLIC OFFICERS AND OFFICERS (1890).
89. 321 So. 2d 78 (Fla. 4th DCA 1975).
90. Id. at 80.
91. FLA. STAT. § 768.28 (1977).
ance. The District Court of Appeal, Third District, has affirmed two trial court orders dismissing third party complaints against counties upon the theory that the counties owed no duty to the third party plaintiffs beyond the duty owed to the general public. By deciding these cases against a county through the use of a rule of law applicable only to municipalities, the district court greatly limited a statute which was to permit an action against the state whenever a like action could be brought against a private person.

IV. SECTION 455.06 OF THE FLORIDA STATUTES (1977)

Predating both Hargrove and Modlin, the Florida Legislature enacted a statute that waived immunity to a limited extent. The statute, an exception to the grant of immunity, was available for over twenty years before the legislature formally abolished sovereign immunity. The statute permitted a political subdivision to procure liability insurance to cover certain governmental operations.

92. Cheney v. Dade County, 353 So. 2d 623 (Fla. 3d DCA 1977), quashed & remanded, 1979 FLA. L. WEEKLY 171 (Fla. Apr. 19) (No. 53,178); Commercial Carrier Corp. v. Indian River County, 342 So. 2d 1047 (Fla. 3d DCA 1977), quashed & remanded, 1979 FLA. L. WEEKLY 171 (Fla. Apr. 19) (No. 51,462); see section VII infra.

93. See FLA. STAT. § 768.28(1) (1977).

94. 1953 Fla. Laws 28220, §§ 1-3 (codified at FLA. STAT. § 455.06 (1977)).

95. The current version of FLA. STAT. § 455.06 (1977) provides:

(1) The public officers in charge or governing bodies, as the case may be, of every county, district school board, governmental unit, department, board, or bureau of the state, including tax or other districts, political subdivisions, and public and quasi-public corporations, other than incorporated cities and towns, of the several counties and the state, all hereinafter referred to as political subdivisions, which political subdivisions in the performance of their necessary functions own or lease and operate motor vehicles upon the public highways or streets of the cities and towns of the state or elsewhere, own or lease and operate watercraft or aircraft, or own or lease buildings or properties or perform operations in the state or elsewhere are hereby authorized, in their discretion, to secure and provide for such respective political subdivisions, and their agents and employees while acting within the scope of their employment, insurance to cover liability for damages on account of bodily or personal injury or death resulting therefrom to any person, or to cover liability for damage to the property of any person or both, arising from or in connection with the operation of any such motor vehicles, watercraft, or aircraft, from the ownership or operation of any such buildings, property, or livestock, or any other such operations, whether from accident or occurrence; and to pay the premiums therefore from any general funds appropriated or made available for the necessary and regular expense of operations of such respective political subdivisions, without the necessity of specific appropriation or specification of expense with respect thereto. Provided, that in those instances where, by general law, provision has been made for the public officer in charge or governing body of any such political subdivision to provide such insurance, this section shall not be construed to impair any such previous acts but shall be construed as cumulative thereto.

(2) In consideration of the premium at which such insurance may be written
The statute was unique in that proprietary functions engaged in by the state, the counties, school boards and other public or quasi-public bodies remained immune, while these bodies could also waive immunity for certain governmental operations. Furthermore, incorporated towns and cities—municipalities—were expressly excluded from the act. Thus, when originally enacted in 1953, a municipality was wholly immune from liability when exercising a governmental function, while any other insured governmental units could be held liable.

Provided that the circumstances of injury came within the parameters of the statute, it was generally agreed that the state, its subdivisions and agencies would be liable to the extent of available insurance. Accordingly, most litigation under the statute centered on whether the governmental activity complained of was encompassed in section 455.06(1).

In Arnold v. Shumpert, Orange County was a defendant in an action arising out of an accident proximately caused by the malfunctioning of a traffic signal. The plaintiffs alleged that the county had waived immunity by procuring insurance pursuant to section 455.06. The Supreme Court of Florida held that the statute did not encompass the maintenance of traffic lights. Though conceding that the insurance policy could easily be construed to cover the negligent operation of the traffic signal, the court determined that section

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it shall be a part of any insurance contract providing said coverage that the insurer shall not be entitled to the benefit of the defense of governmental immunity of any such political subdivisions of the state in any suit instituted against any such political subdivision as herein provided, or in any suit brought against the insurer to enforce collection under such an insurance contract; and that the immunity of said political subdivision against any liability described in subsection (1) as to which such insurance coverage has been provided, and suit in connection therewith, are waived to the extent and only to the extent of such insurance coverage; provided, however, no attempt shall be made in the trial of any action against a political subdivision to suggest the existence of any insurance which covers the whole or in part any judgment or award which may be rendered in favor of the plaintiff, and if a verdict rendered by the jury exceeds that limit of the applicable insurance, the court shall reduce the amount of said judgment or award to a sum equal to the applicable limit set forth in the policy.

Id. (emphasis added).

96. See, e.g., Buffkin v. Board of County Comm’rs, 320 So. 2d 876 (Fla. 4th DCA 1975); Baugh v. Alachua County, 305 So. 2d 838 (Fla. 1st DCA 1975); Moreno v. Aldrich, 113 So. 2d 406 (Fla. 2d DCA 1959). But see Valdez v. State Rd. Dep’t, 189 So. 2d 823 (Fla. 2d DCA 1966).

97. But see Moreno v. Aldrich, 113 So. 2d 406 (Fla. 2d DCA 1959) (first reported decision under § 455.06 wherein the court affirmed the reduction of a jury verdict to the maximum extent of the insurance coverage).

98. 217 So. 2d 116 (Fla. 1968).

99. Id. at 118.
455.06 was not broad enough to authorize procurement for this type of governmental function.\textsuperscript{100}

In \textit{Baugher v. Alachua County},\textsuperscript{101} the court affirmed, in part,\textsuperscript{102} a trial court's order dismissing with prejudice a complaint against the county for negligence and wrongful death. The county had procured insurance pursuant to section 455.06. William Baugher was killed while an inmate at the county jail. Finding no statutory or decisional authority for the proposition that a county is responsible for the operation of a county jail, the court stated that while the availability of insurance evidences a waiver of immunity, it "does not have the effect of establishing liability. The commission of a tort must first be shown."\textsuperscript{103}

The narrow reading of the statute in \textit{Arnold} was avoided in \textit{Buffkin v. Board of County Commissioners}.\textsuperscript{104} There, the plaintiff's two-year old son drowned in a drainage ditch maintained by the county's mosquito control district. The District Court of Appeal, Fourth District, found that the complaint stated a cause of action, as the mosquito district had waived immunity pursuant to section 455.06. \textit{Arnold} was summarily distinguished on its facts, \textit{i.e.}, a traffic light.

Perhaps the most liberal reading of the statute was \textit{Surette v. Galiardo},\textsuperscript{105} in which the plaintiff, whose son was struck and killed by a car while standing at a school bus stop, alleged that the school district was negligent in failing to provide a safe bus stop site and that the school district had waived immunity under section 455.06. The trial court held that the statute was not sufficiently broad to

\textsuperscript{100}Id. at 119. Plaintiffs contended that the phrase "to cover liability . . . arising from . . . the operation of . . . any such buildings [or] property" in \textsection{} 455.06(1) included a traffic light as property. Applying the doctrine of \textit{ejusdem generis}, the court rejected the argument.

\textsuperscript{101}305 So. 2d 838 (Fla. 1st DCA 1975).

\textsuperscript{102}The court reversed the dismissal with prejudice, granting leave for the plaintiff to file an amended complaint.

\textsuperscript{103}Id. at 839. Acting Chief Judge Boyer concurred, suggesting that counties could be held liable for failing to furnish facilities that are adequate for sheriffs to properly discharge their duties.

\textsuperscript{104}320 So. 2d 876 (Fla. 4th DCA 1975), \textit{cert. denied}, 338 So. 2d 841 (Fla. 1976).

\textsuperscript{105}323 So. 2d 53 (Fla. 4th DCA 1975). The procedural history of the case is complex. Prior to the Fourth District's opinion, the supreme court in \textit{School Bd. v. Surette}, 281 So. 2d 481 (Fla. 1973), upheld the trial court's denial of the county insurer's motion to sever, pursuant to \textsection{} 455.06(2). The court ruled that the provision in the statute prohibiting the suggestion of insurance at the trial was unconstitutional. The section conflicted with the constitutional grant to the supreme court to adopt rules and procedures for all courts. \textit{See} FLA. \textit{Const. art. V, \textsection{} 2(a).} Subsequent to the district court's opinion, the cause came before the supreme court two more times: \textit{School Bd. v. Surette}, 339 So. 2d 194 (Fla. 1976); \textit{School Bd. v. Surette}, 348 So. 2d 301 (Fla. 1977). Both decisions dealt with the question of severance. In a concurring opinion, Justice England noted that the latest appeal "is either frivolous or intended to achieve delay." 348 So. 2d at 303.
constitute a waiver of immunity under the facts. The district court focused on the "necessary function" test of the statute. It readily determined that the school district had a statutory duty to provide transportation for its pupils, which encompassed such considerations as bus routes, schedules and stops.\textsuperscript{106} It relied on its earlier decision of \textit{Buffkin} and further distinguished \textit{Arnold} on its facts.

The reading of the statute by the District Court of Appeal, Third District, has been inconclusive. In \textit{Jolly v. Insurance Co. of North America},\textsuperscript{107} plaintiff brought a negligence and wrongful death action against the city of Key West and the Florida Keys Aqueduct Authority. The court affirmed the dismissal of the complaint on the basis that the city, as an incorporated political body, is expressly excluded from the provisions of section 455.06. Furthermore, the court, relying upon \textit{Modlin v. City of Miami Beach},\textsuperscript{108} held the complaint defective as failing to allege a specific duty as opposed to a general duty.\textsuperscript{109}

The court found that the Aqueduct Authority was created by the legislature\textsuperscript{110} and was the type of public corporation contemplated by the statute. The court noted that the mere waiver of immunity in itself does not establish liability absent the commission of a tort. Recognizing that Mrs. Jolly's death was not a foreseeable consequence of the negligent maintenance of the water supply, the court affirmed a summary judgment. It remanded on plaintiff's claim for property damage, however, stating that the property loss was foreseeable.

Another recent Third District opinion, \textit{McPhee v. Dade County},\textsuperscript{111} concerned a wrongful death action in which the decedent had drowned off Virginia Beach, a county park. Relying on \textit{Buffkin} and \textit{Surette}, the court noted that the beach was operated by the county in its proprietary capacity, and, inasmuch as section 455.06 applies to governmental activity, the statute afforded no relief.

The Third District opinions, though apparently inconsistent, are reconcilable. Once it found a governmental function, the court in \textit{Jolly} was able to give a liberal reading to section 455.06. In

\begin{enumerate}
\item[106.] 323 So. 2d at 56.
\item[107.] 331 So. 2d 368 (Fla. 3d DCA 1976) (per curiam).
\item[108.] 201 So. 2d 70 (Fla. 1967).
\item[109.] A fire broke out at the plaintiff's residence. Key West firemen had it under control when the water supply suddenly failed. As a result of the water failure, the house was destroyed. Seeing this, Mrs. Jolly "became aggravated and upset which, in conjunction with the heat and smoke . . . aggravated a pre-existing condition which resulted in her death." 331 So. 2d at 369.
\item[110.] 1941 Fla. Laws ch. 21230.
\item[111.] 362 So. 2d 74 (Fla. 3d DCA 1978).
\end{enumerate}
McPhee no such finding could be made, and thus the threshold determination of the availability of the statute could not be overcome. As the court correctly noted, the text of section 455.06(2) uses the term governmental immunity and not "sovereign immunity." By defining sovereign immunity to include both governmental and proprietary activities, the court determined that "[g]overnmental immunity must be construed to mean immunity for governmental functions." By giving the term this construction, it harmonizes the "necessary function" language of the statute.

With the enactment of section 768.28 of the Florida Statutes (1977), future utilization of section 455.06 will be limited. In retrospect, the statute can be considered an anomaly. It continues to immunize municipalities from tort liability arising out of governmental activities and to immunize the state and counties from liability arising out of proprietary functions. It gives complete discretion to the state, school boards, etc. to procure insurance, without any incentive to do so. Indeed, one wonders why a governmental body would want to incur the expense of procuring insurance when it was already fully immunized. Its salutary feature is that it did provide relief to a limited class of plaintiffs during a period when the doctrine of sovereign immunity was impenetrable, and the judiciary and legislature could not, or would not, furnish relief.

V. THE STATUTORY ABOLITION OF IMMUNITY

In 1973, the legislature exercised its constitutional authority by enacting section 768.28 of the Florida Statutes, abolishing sovereign immunity. While limiting the extent of recovery, the statute has provided a remedy against the state for its wrongful acts.

The statute, after stating that immunity has been waived "only to the extent specified in this act," sets forth broad terms under which the state may be sued:

112. See note 95 supra.
113. McPhee, 362 So. 2d at 80.
114. Id.
115. Fla. Const. art. X, § 13; see note 3 supra.
117. Fla. Stat. § 768.28(5) (1977), which provides in part:
Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $100,000.
118. Id. § 768.28(1).
SOVEREIGN IMMUNITY

Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted . . . .

and: "[T]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances."

Though the statute provides that the state can be sued on the same basis as "if a private person," the courts, relying on pre-waiver precedent, have failed to allow this provision its broadest construction.

The refusal of the courts to respond to the broad mandate of the waiver is reflected in recent venue decisions. In contrast to the current Florida venue statute which provides that "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located," the pre-waiver common law rule of venue applicable to the state provided that an action would lie in the county where the defendant state, agency or subdivision maintained its principal offices.

The state's privilege of being sued at the seat of government, being a question of venue and not subject matter jurisdiction, can be waived by the state either by litigating on the merits in the county where the action was brought or by requesting a change of venue to a county other than the county where the principal offices of the state or agency are located.

The "initial sword-wielder" exception to the venue rule was created by the District Court of Appeal, Second District, in

119. Id. (emphasis added). Section 768.28(2) defines state agencies or subdivisions to include "the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state counties, or municipalities."

120. Id. § 768.28(3) (emphasis added).

121. Id. § 47.011 (emphasis added).

122. See, e.g., Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977); Smith v. Williams, 160 Fla. 580, 35 So. 2d 844 (1948); Ringling Bros. Barnum & Bailey Combined Shows, Inc. v. State, 295 So. 2d 314 (Fla. 1st DCA 1974).


Department of Revenue v. First Federal Savings & Loan Association. There, the department sent a formal notice of assessment to the bank for delinquent taxes. The bank responded by filing suit in circuit court to enjoin the collection. A change of venue to Leon County was denied. The court noted that there may be instances in which the state's action is that of an "initial sword-wielder" and "the plaintiff's action is in the nature of a shield . . . [so that] the suit may be maintained in the county wherein the blow has been or is imminently about to be laid on." Inasmuch as the state's notice to the bank, however, was merely a demand without any threat of affirmative action, the state's motion should have been granted.

The dictum of the First Federal Savings & Loan decision was elevated to a holding in State Department of Transportation v. Chothen. There, the plaintiff sued the Department of Transportation in Dade County for an injury occurring in Dade County. The trial judge, on authority of First Federal Savings & Loan, denied the state's motion for a change of venue. The District Court of Appeal, Third District, affirmed, interpreting the first clause of section 768.28(5) to subject the state to the general venue statutes of the state. The court further held that since the department had allegedly caused the damage, it was the "initial sword-wielder." Thus, the doctrine was appropriate and venue was proper in Dade County.

Though the Supreme Court of Florida denied certiorari, the propriety of the decision later came before the court by way of conflict certiorari. In Game & Fresh Water Fish Commission v. Carlile the District Court of Appeal, Fourth District, disagreed with the interpretation by the Third District of the first clause of section 768.28(5) and stated: "[W]e do not consider that the . . . portion of the statute which modified the doctrine of sovereign immunity is sufficiently broad to eliminate the long standing venue rules pertaining to state agencies, in view of the reasons underlying those rules and in the absence of any specific statutory change." The court then found the sword-wielder doctrine to be inapplicable because the plaintiff, having filed a suit alleging negligent nonfeas-

125. 256 So. 2d 524 (Fla. 2d DCA 1971).
126. Id. at 526.
127. 328 So. 2d 574 (Fla. 3d DCA), cert. denied, 339 So. 2d 1172 (Fla. 1976), overruled, Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977).
128. See text accompanying note 120 supra.
129. FLA. STAT. §§ 47.011-.191 (1977).
130. State Dep't of Transp. v. Chothen, 339 So. 2d 1172 (Fla. 1976).
131. 341 So. 2d 1015 (Fla. 4th DCA 1977).
132. Id. at 1017.
SOVEREIGN IMMUNITY

ance, was the prime mover.

The supreme court affirmed, in a four to three decision, expressly overruling Chothen. After stating the general common law rule, the court interpreted the scope of section 768.28(5) of the Florida Statutes. Noting that the statute is "clearly" in derogation of the common law doctrine of sovereign immunity and accordingly "must, therefore, be strictly construed," the court quoted from Florida Jurisprudence:

[Statutes] will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common-law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.

With this maxim as its framework, the court readily determined that the legislature had not intended to abrogate the common law venue rule. Support for this interpretation was gleaned from the 1969 Torts Claim Act which expressly provided that actions be brought in the county where the cause of action arose. Since this provision does not appear in the 1975 version of the statute, the court reasoned that the legislature had not intended to waive the venue rule. The court, noting that the sword-wielder doctrine had been misapplied in Chothen, held it to be inapplicable to negligence actions.

Although the Third District clearly misapplied the sword-wielder doctrine in Chothen, its interpretation of the interaction between section 768.28(5) and the statutory venue provisions appears to be correct. By invoking a strict standard of statutory construction to determine if a judicial rule has been abrogated, the court has required the legislature to enact statutes with specificity.

The wording of section 768.28 evidences an intent to waive immu-

134. See text accompanying note 122 supra.
137. See note 2 and accompanying text supra.
140. Id. §§ 47.011–.191.
ity and to permit the state to be treated as if it were a private citizen. The decision by the supreme court in *Carlile* forces the legislature to detail expressly those sovereign rights that are being waived by the state.

The rationale for the common law venue rule, like the rationale for the doctrine of sovereign immunity, is grounded in history and no longer seems appropriate. The purpose of the venue rule was to foster and promote orderly, efficient and economical government. By requiring that the action be brought where the agency maintained its office, the state could defend with a minimum outlay of time, effort and public funds.\(^{144}\) With the current state of transportation and the relative ease with which one can move from place to place, there is much less rationale for the rule.

An even more disheartening construction of section 768.28 of the Florida Statutes occurred in *Cheney v. Dade County*.\(^{142}\) *Cheney* was an action against the county for negligent maintenance of a traffic light. Prior to the waiver of immunity, actions alleging improper maintenance of traffic control devices had been instituted against municipalities without success. Relying on *Modlin v. City of Miami Beach*,\(^{143}\) the courts had held municipalities not liable to individuals for negligent maintenance of traffic control devices on the basis that only a general duty was owed.\(^{144}\)

In *Cheney*, the District Court of Appeal, Third District, was presented with the issue of whether section 768.28 invalidated the *Modlin* rationale and thus allowed counties (and municipalities) to be held liable to individuals for breach of a duty owed to the general public. The court found that *Modlin* remained applicable to counties, thus restricting the scope of the waiver of immunity provisions contained in subsections 768.28(1) and (5).\(^{145}\)

The court basically accepted the interpretation argued by Dade County that section 768.28 waived the immunity of the county for proprietary functions and not governmental functions. But as pointed out by Judge Hubbart's dissent, the statute "contains no such limiting language; it clearly waives governmental tort immunity for the state, counties and municipal corporations of Florida without reference to whether the sovereign function involved in

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141. See Smith v. Williams, 180 Fla. 580, 35 So. 2d 844 (1948); Game & Fresh Water Fish Comm'n v. Carlile, 341 So. 2d 1015 (Fla. 4th DCA 1977).

142. 353 So. 2d 623 (Fla. 3d DCA 1977), quashed and remanded, 1979 Fla. L. Weekly 171 (Fla. Apr. 19) (No. 53,178); see section VII infra.

143. 201 So. 2d 70 (Fla. 1967).

144. See, e.g., Gordon v. City of West Palm Beach, 321 So. 2d 78 (Fla. 4th DCA 1975); City of Tampa v. Davis, 226 So. 2d 460 (Fla. 2d DCA 1969).

145. See text accompanying notes 119-120 supra.
which the tort arises is governmental or proprietary."146 By recognizing the governmental/proprietary distinction, the court resurrected a dichotomy which the supreme court had apparently abolished over twenty years ago.147

Section 768.28 of the Florida Statutes contains thirteen subsections.148 Section 768.28(1) states the waiver of immunity and makes clear that the doctrine of respondeat superior is applicable to the state, its agencies or subdivisions.149 The waiver applies to "injury or loss of property, personal injury, or death caused by . . . negligent or wrongful acts or omissions."150 It appears evident that the state may now be sued for the misfeasance or nonfeasance of its officials or employees and is potentially liable for claims arising under the Florida Wrongful Death Act.151 Section 768.28(2) is a definitional section, defining agencies and subdivisions.152

Section 768.28(3) permits all governmental agencies and subdivisions except municipalities to request, at the discretion of the agency or subdivision, the assistance of the Department of Insurance with "consideration, adjustment, and settlement of any claim under this act."153 Since many state agencies would be unable to comprehend fully claims made against them, this subsection is beneficial to claimants because claims can be considered by a state department which ostensibly has expertise in claim settlement. This provision also insures that the six-month notice requirement of the statute154 would not be merely a delaying tactic but would encourage consideration and attempted settlement of claims.

Section 768.28(4) provides that any agency or subdivision can appeal any "award, compromise, settlement, or determination to the court of appropriate jurisdiction."155 While the word "judgment" does not appear in the subsection, it does use the term "award." The

146. 353 So. 2d at 627 (Hubbart, J., dissenting).
147. See Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), wherein the court characterized the distinction as "anachronistic not only to our system of justice but to our traditional concepts of democratic government." Id. at 132.
148. Section 768.28(10) as originally enacted was repealed in 1977. 1977 Fla. Laws ch. 77-86. That subsection provided that the maximum monetary recovery permitted by the section was inapplicable where the governmental body had procured liability insurance for a negligent act or omission which could be brought pursuant to the section to the extent such policy provided coverage.
149. See text accompanying note 119 supra.
150. Id. at 132. 151. FLA. STAT. § 768.28(1) (1977).
152. See note 119 supra.
153. FLA. STAT. §§ 768.16-.27.
154. See note 119 supra.
155. Id. § 768.28(4).
subsection apparently provides the right of the agency or subdivision to appeal from an adverse judgment.

Section 768.28(5) is perhaps the polestar of the section. Its first sentence reiterates the waiver of immunity but prohibits punitive damages or prejudgment interest. The key phrase in the sentence, "under like circumstances," has been interpreted to preclude an action against a sheriff for negligence in failing to apprehend an escaped mental patient, because "a private person would never be liable for his failure to apprehend a dangerous escaped mental patient." The decision of the District Court of Appeal, First District, in Department of Health & Rehabilitative Services v. McDougall, and the decision of the District Court of Appeal, Third District, in Cheney v. Dade County, redeveloped the governmental/proprietary distinction. These opinions held that the state, its agencies or subdivisions are immune from liability when they negligently perform a governmental act because a private individual would never perform a governmental function.

It is submitted that this interpretation does not further the legislative intent of the act and can only foster the distinctions that the supreme court sought to avoid when it decided Hargrove v. Town of Cocoa Beach. It seems equally logical that the legislature's choice of words was not intended to limit the waiver but to emphasize its extent by equating the sovereign liability to that of a private individual.

The second sentence of the subsection limits the maximum recovery from the state, its agencies or subdivisions by any one person to $50,000 and $100,000 for any one incident or occurrence. Two decisions of the District Court of Appeal, First District, have given this sentence an expansive reading.

In Department of Health & Rehabilitative Services v. McDougall, the First District held that the $100,000, and not the $50,000 limitation, applied to a plaintiff who brought a wrongful death action on behalf of her children and herself. In State Board

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156. See text accompanying note 120 supra.
157. "[J]ust liability shall not include punitive damages or interest for the period prior to judgment." FLA. STAT. § 768.28(5) (1977).
158. Department of Health & Rehab. Servs. v. McDougall, 359 So. 2d 528, 532 (Fla. 1st DCA 1978), overruled by implication, Commercial Carrier Corp. v. Indian River County, 1979 FLA. L. WEEKLY 171 (Fla. Apr. 19) (No. 51,462); see section VII infra.
159. Id.
160. 353 So. 2d 623 (Fla. 3d DCA 1977), quashed & remanded, 1979 FLA. L. WEEKLY 171 (Fla. Apr. 19) (No. 53,178); see section VII infra.
161. 96 So. 2d 130 (Fla. 1957); see notes 72-75 and accompanying text supra.
162. See note 117 supra.
163. 359 So. 2d 528 (Fla. 1st DCA 1978).
of Regents v. Yant, the First District expanded on its earlier decision in McDougall, holding that in a claim by a minor and his mother for injuries received by the minor, the mother's cause of action for medical expenses incurred was separate and distinct from the minor's claim. Accordingly, the $100,000 limitation was applicable.

The court then held that because the state, its agencies or subdivisions are liable "in the same manner and to the same extent as a private individual under like circumstances," the state, agency or subdivision is liable for postjudgment interest. On rehearing the court further noted that the monetary limitation does not apply to court costs.

The third sentence of the subsection provides a method for plaintiffs to recover judgments in excess of the $50,000/$100,000 limitation. If a judgment in excess of the applicable limit is rendered, the excess amount may be paid only upon further act of the legislature. Thus, a private claims bill authorizing the additional sum is required.

The final sentence of the subsection was added in 1977 and dispelled any confusion created by a 1976 Attorney General opinion. As noted above, municipalities have long been held responsible in tort, without any monetary limitation. Section 768.28(2) of the Florida Statutes (1977) defines a municipality to be included in the term "state agencies or subdivisions." Predictably, the issue had arisen as to whether the monetary limitations of section 768.28(5) were applicable to municipalities.

Relying on Modlin v. City of Miami Beach, the Attorney General had concluded:

[W]ith the exception of immunity in the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions, . . . municipalities possessed no aspect of the state's sovereign immunity from tort liability upon which the waiver contained in § 768.28, and the limitations specified therein, could operate. . . .

164. 360 So. 2d 99 (Fla. 1st DCA 1978).
165. Id. at 101. (quoting Fla. Stat. § 768.28(5) (1977)).
166. The third sentence of Fla. Stat. § 768.28(5) (1977) provides:
   However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.
168. 201 So. 2d 70 (Fla. 1967).
In sum, the state's waiver of sovereign immunity contained in § 768.28 does not operate to limit in any substantive way the tort liability of municipalities under the doctrine of respondeat superior. 169

The legislature, emphasizing its intent that municipalities be included in the monetary limitations of the statute, added the last sentence to the subsection. 170

Section 768.28(6) requires that, prior to initiating suit, a notice of claim must be filed with the appropriate agency within three years of accrual of the claim. Except for claims against municipalities, notice of the claim must also be given to the Department of Insurance. Failure to furnish notice of the claim bars the action until notice has been given. If either the Department of Insurance or the affected agency fails to make a final disposition of the claim within six months after notice has been given, it is statutorily deemed to be a final denial of the claim and suit can be instituted.

Though section 768.28(11) is the statute of limitations subsection, the interplay of sections 768.28(6) and (11) can trap the unwary practitioner. Section 768.28(11) provides for a four-year period from the date the claim accrues in which to commence a civil action "by filing a complaint in the court of appropriate jurisdiction." Otherwise, the claim "shall be forever barred." 171 Since notice is a condition precedent to instituting an action, however, if it is not given to the appropriate agency within three years as demanded by section 768.28(6), the claim is also barred.

An area of potential litigation regarding section 768.28(6) involves municipalities. It is evident that this subsection applies to municipalities. 172 Section 95.241 of the Florida Statutes, however, provides that "[n]o notice of claim of injury shall be required as a prerequisite to the maintenance of any action against a municipality. All portions of municipal ordinances and charters and statutes in conflict with this section are repealed." 173

Section 95.241 was amended by the legislature in 1974 174 and

170. See 1977 Fla. Laws ch. 77-86, preamble, which states: "The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974."

172. Section 768.28(6) provides that "except as to any claim against a municipality," notice must also be given to the Department of Insurance. Thus, by negative inference, notice must be given to municipalities.

became effective January 1, 1975. Section 768.30, enacted by the legislature in 1973,\textsuperscript{175} provided that the effective date for section 768.28 was to be January 1, 1975.

Thus, section 768.28(6) and section 95.241, which became effective on the same day, are in conflict. Since section 95.241, however, explicitly waives any notice requirement regarding municipalities while section 768.28(6) only inferentially implies a notice requirement, it could be argued that section 95.241 repeals that portion of section 768.28(6) requiring notice to municipalities.\textsuperscript{176}

Section 768.28(7) provides that service of process be made upon the head of the agency affected and, except for municipalities, upon the Department of Insurance. The affected agency has thirty days in which to respond to the complaint.

Section 768.28(8) limits attorney's fees to twenty-five percent of any judgment or settlement and provides that "[n]o attorney may charge, demand, receive, or collect"\textsuperscript{177} any additional sums.

Section 768.28(9) indemnifies officers, employees or agents of the state or its subdivisions from personal liability for any act or omission occurring within the scope of employment. If the employee, officer or agent, however, "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property,"\textsuperscript{178} the individual is subject to personal liability. The subsection provides that, subject to the liability limitations of section 768.28(5), the state shall pay any judgment rendered in a civil action against the individual officer, employee or agent. The subsection raises a number of issues, one of which is in conflict among the district courts while the others are fertile for litigation.

In Metropolitan Dade County v. Kelly,\textsuperscript{179} a county employee appealed the denial of his motion to dismiss for failure to state a cause of action. The District Court of Appeal, First District, agreed with the employee, noting that absent bad faith, a governmental employee is not liable by virtue of section 768.28(9) and cannot be

\textsuperscript{175} 1973 Fla. Laws ch. 73-313, § 4. The 1974 Florida Legislature amended Fla. Stat. § 768.30 (1973) so that the effective date of § 768.28 was July 1, 1974, for the executive department of the state. 1974 Fla. Laws ch. 74-235. The statute became effective for agencies and subdivisions on January 1, 1975.

\textsuperscript{176} But see Paquin v. Town of Gulfstream, No. 78-3086 CA (L)01K (15th Jud. Cir.) (claim against the municipality dismissed for failure to comply with Fla. Stat. § 768.28(6) on authority of Cheney v. Dade County, 353 So. 2d 623 (Fla. 3d DCA 1977), quashed & remanded, 1979 FLA. L. WEEKLY 171 (Fla. Apr. 19) (No. 53,178)).

\textsuperscript{177} Fla. Stat. § 768.28(8) (1977).

\textsuperscript{178} Id. § 768.28(9).

\textsuperscript{179} 348 So. 2d 49 (Fla. 1st DCA 1977).
a party to the action.

The District Court of Appeal, Second District, in *Talmadge v. District School Board*, 180 viewed the subsection as indemnifying an employee and not immunizing him from suit. Accordingly, it reversed the order of the trial court dismissing the employee from the action.

The District Court of Appeal, Third District, accepted the reasoning of the Second District, and, in *Paul v. Heritage Insurance Co. of America*, 181 reversed a summary judgment in favor of a governmental employee who had relied upon *Kelly*.

With three of the four districts having construed the subsection, and with a conflict existing in these opinions, the point is ripe for review by the supreme court. Considering that the First District only relied upon the first sentence of the subsection and failed to read the subsection as a whole, it is reasonable to conclude that the construction of the statute by the Second and Third Districts is the correct one. Because the second sentence provides that “the state shall pay any monetary judgment which is *rendered* in a civil action *personally against* an officer, employee, or agent,” 182 it appears that the statute intended the state to indemnify the employee, not to make him immune from suit.

If an employee were immune from being named as a defendant, this would create technical problems for the claimant while preparing his case for trial. Since the rules of civil procedure distinguish between parties and witnesses and the types of discovery available, the negligent employee may be a necessary party to any action against the state. 183

The construction of the subsection providing indemnification of the employee could possibly circumvent the notice requirements of section 768.28(6). If a claimant fails to provide the requisite notice within the allotted three-year period, an action could still be maintained against the employee. 184 Because the first sentence of section 768.28(9) provides that the employee shall not be “held personally liable . . . for any injuries or damages suffered,” 185 the employee could institute a third party suit against the state for indemnification.

180. 355 So. 2d 502 (Fla. 2d DCA 1978).
181. 363 So. 2d 563 (Fla. 3d DCA 1978).
182. FLA. STAT. § 768.28(9) (1977) (emphasis added).
183. Compare FLA. R. Civ. P. 1.310 (allowing oral depositions of “any person”) with id. 1.340 and id. 1.360 (limiting written interrogatories and physical and mental examinations respectively to parties).
184. See FLA. STAT. § 95.11 (1977).
185. Id. § 768.28(9).
Though the statute expressly prohibits the imposition of punitive damages, a possible interpretation of section 768.28(9) could permit exemplary damages. The prohibition against punitive damages only appears in the subsection wherein the state waives immunity for its own acts;\textsuperscript{186} it does not appear in the subsection where the state waives immunity and adopts the doctrine of respondeat superior.\textsuperscript{187} Indeed, section 768.28(1) provides that the state would be liable “if a private person would be liable to the claimant in accordance with the general laws of this state.”\textsuperscript{188} Accordingly, since a private person can be held liable under respondeat superior for punitive damages, the state could also be held liable.\textsuperscript{189}

Although section 768.28(9) permits the employee, officer or agent to be held personally liable if he acted in bad faith or with a malicious purpose, it does not bar indemnification. Thus, if the officer, employee or agent is found to have acted within the scope of his employment with the requisite malice so as to warrant punitive damages, the state could be held liable. This point has never been resolved by an appellate court. In view of settled precedent barring punitive damages against a municipality,\textsuperscript{190} it is doubtful that the above construction of the statute would be favorably received.

Section 768.28(10) provides that other laws permitting the state, its agencies or subdivisions to procure insurance are still in force and effect and are not to be restricted by the statute.\textsuperscript{191} The statute explicitly provides that section 768.28 is an additional remedy and does not replace existing statutes that constitute a limited waiver of immunity.

Section 768.28(12) makes clear that the waiver of immunity does not extend to persons involved in riots, riot violence, civil disobedience, etc., if the claim arises out of such activity. This subsection apparently was included to prevent a participant in such a disturbance from bringing suit against the sovereign. The act prohibits such a participant from bringing suit. It is silent, however, as to the rights of a victim of a civil disturbance. Accordingly, it is

\textsuperscript{186} Id. § 768.28(5).
\textsuperscript{187} Id. § 768.28(1).
\textsuperscript{188} Id.
\textsuperscript{189} See, e.g., Wackenhut Corp. v. Canty, 359 So. 2d 430 (Fla. 1978); Alexander v. Alterman Transp. Lines, 327 So. 2d 860 (Fla. 1st DCA 1976); Wackenhut Corp. v. Green, 238 So. 2d 431 (Fla. 3d DCA 1971).
\textsuperscript{190} See, e.g., Fischer v. City of Miami, 172 So. 2d 455 (Fla. 1965); Walker v. City of Miami, 337 So. 2d 1002 (Fla. 3d DCA 1976).
\textsuperscript{191} See, e.g., FLA. STAT. §§ 234.03, 455.06 (1977). See also [1975] FLA. ATT'Y GEN. ANNUAL REP. 436.
presumed that in the absence of an express statutory grant permitting an action, judicial decisions barring such claims remain valid.\(^2\)

The final subsection of the statute, section 768.28(13), provides that the state, its agencies or subdivisions can be self-insured, enter risk management programs or purchase liability insurance to protect against liability which could be imposed by the statute.

A reading of the statute reveals that the legislature has provided a broad waiver of immunity, limited only to a maximum monetary amount. Additionally, this statutory amount is not absolute, so a claimant can recover his full judgment (if in excess of the statutory limitation) upon legislative approval. Though the statute on its face broadly waives immunity, it has not been so interpreted by the courts. Relying on principles developed prior to the statute, the courts have construed the statute narrowly so as to avoid the complete abolition of immunity.

VI. CONCLUSION

In November 1978, the voters of Florida were offered the opportunity to revise the constitution. Constitutional revision proposal number one would have revised a number of sections of the constitution, including article 10, section 13. The revised section would have constitutionally abolished sovereign immunity.\(^3\) By rejecting the revision the voters decided to continue with the present provision regarding immunity. Legislative changes, however, are needed if the intended waiver of immunity is to occur in practice.

The legislature should address two critical areas. First, the statute as presently construed by the Florida courts requires that an action against the state or state agency be maintained in the county where the governmental defendant maintains its principal office even though the cause of action arose elsewhere. Since this venue requirement would, in the vast majority of cases, require plaintiffs to try their cases in Tallahassee, this could well present a financial hardship to many plaintiffs. Consequently, this provision should be changed by the Florida Legislature by simply adding a subsection

\(^2\) See, e.g., Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970).

\(^3\) The Florida Constitutional Revision Commission would have revised Fla. Const. art. X, § 13, to read:

*No sovereign immunity in contract or in tort.* The doctrine of sovereign immunity shall not be applicable in this state in contract or in tort for personal injury, wrongful death or property damage. Punitive damages shall not be recoverable against the state, counties, school districts, municipalities, special districts or any of their agencies. (emphasis added).

to section 768.28 providing that the general venue statute is applicable or that the action may be brought in the county where the cause of action arose.

The second area where legislation is needed is in answer to the question of how to handle Modlin v. City of Miami Beach. The two district courts which have attempted to reconcile Modlin with section 768.28 have only managed to emasculate the effectiveness of the section. What is needed is an unambiguous legislative statement that the state is to be treated like a private citizen in all instances when called before a court to answer for its negligence. This may well call for a clear legislative pronouncement that Modlin is no longer to be followed in Florida.

Overruling the Modlin rule would not mean automatic liability. As an individual is not the insurer of another's safety, so too the state would not be held to such a standard in a negligence action. Negligence would still have to be proven before the state could be held liable. The old, artificial distinction between general and specific duty, created prior to the abolition of immunity, should not be permitted to thwart the legislative intent expressed in section 768.28. A private person cannot avoid liability by claiming that he owed only a "general duty" to the injured party. So too, the state should not escape liability by so alleging.

The statute contains the basic foundation for a complete waiver of immunity, limited only by the amount of recovery and notice. Since the courts have been unwilling to implement the statute to its full extent, additional legislative action is needed. Until the legislature does act, the "Access to Courts" provision in the constitution, though more meaningful than before, will continue to elude many claimants.

VII. Postscript

On April 19, 1979, subsequent to the preparation of the above article, the Supreme Court of Florida, in a consolidated opinion, reversed the District Court of Appeal, Third District, decisions in

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194. 201 So. 2d 70 (Fla. 1967).
197. Id. § 768.28(5).
198. See note 4 supra.
Commercial Carrier Corp. v. Indian River County and Cheney v. Dade County, thereby laying to rest the Modlin general duty/special duty dichotomy. After a brief review of decisions applying the governmental function/proprietary function and the general duty/special duty distinctions, the court readily concluded that "Modlin and its ancestry and progeny have no continuing vitality subsequent to the effective date of section 768.28." The supreme court also rejected the second argument of the county that the statute barred an action for negligent maintenance of a traffic light as a private citizen could never be held liable for such conduct. Relying on Indian Towing Co. v. United States, the court refused to place "such a gloss on our waiver statute." Thus, it appears that the First District’s decision in Department of Health and Rehabilitative Service v. McDougall has been overruled by implication.

The final contention of the county that the negligent acts complained of were discretionary and hence outside the scope of the statute, was more troublesome for the court. Noting that the Florida statute, unlike the Federal Tort Claims Act, did not contain an exception for discretionary acts, the court adopted a planning level/operational level dichotomy identical to that accepted by the Supreme Court of California. Recognizing that the separation of powers doctrine prevents a judge or jury from substituting its judgment for that of a governmental body regarding the reasonableness of a planning activity, the court held that certain discretionary functions remain immune from that liability. Thus, the court expressly refrained from opining as to whether a governmental body could be liable for its failure in the first instance to install a traffic device. But, once installed, its maintenance is operational and, therefore, liability will attach for any negligence. The determination of what is a planning decision and what is operational is to be left to the trial courts for a case by

199. 342 So. 2d 1047 (Fla. 3d DCA 1977).
200. 353 So. 2d 623 (Fla. 3d DCA 1977).
202. Id. at 173.
203. Fla. STAT. § 768.28(1), (5) (1975).
205. 1979 Fla. L. WEEKLY at 173.
206. 359 So. 2d 528 (Fla. 1st DCA 1978).
Though the full impact of the decision will depend on future decisions of the district courts, the magnitude of the opinion is obvious. By expressly noting that the statute permits actions based on contribution and indemnity, the decision will form the basis for a multitude of third party actions. Thus, either directly or by impleading, governmental bodies of the state can expect to become parties to actions even where the governmental connection is tenuous. Defendants in automobile negligence actions will no doubt claim a malfunctioning traffic device; landowners or contractors sued for negligence will claim that a building inspector breached a duty to them. Indeed, one would expect that in any action involving a malfunctioning elevator, the governmental unit responsible for inspecting it will be involved in the suit.

The court has given a broad reading to the statute and in so doing has effectively abolished the doctrine of sovereign immunity in Florida. Whether this broad interpretation evidences the intent of the legislature will no doubt eventually be answered by that branch of government. It is obvious, however, that for the time being the court has vindicated Max Modlin's theory of governmental liability.